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No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1952.

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y.
KEELER, F. HOWARD SMITH, HAROLD A. ROUS-
SELOT, HENRY H. BALFOUR, J. ANTONIO ZALDU-
ONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE,
AND HERBERT R. JOHNSON, DOING BUSINESS UN-
DER THE FIRM NAME AND STYLE OF ORVIS BROTH-
ERS & Co., AND JOHN J. MCLOSKEY, JR., AS CITY
SHERIFF OF THE CITY OF NEW YORK, PETITIONERS

v.

JAMES P. MCGPANEY, ATTORNEY GENERAL OF THE
UNITED STATES, AS SUCCESSOR TO THE ALIEN
PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, AND HERBERT R. JOHNSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ORVIS BROTHERS & Co., AND JOHN J. McCLOSKEY, JR., AS CITY SHERIFF OF THE CITY OF NEW YORK, PETITIONERS

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the District Court (R. 66) is not reported. The opinion of the Court of Appeals (R. 76) is reported at 198 Fed. 2d. 708.

JURISDICTION

The judgment of the Court of Appeals (R. 80) was entered on June 30, 1952. A petition for rehearing filed on July 14, 1952 (R. 81) was denied on July 29, 1952 (R. 88). Petition for writ of certiorari was filed on October 21, 1952. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a creditor who had levied an attachment, not licensed under Executive Order No. 8389, as amended, on blocked property of his enemy debtor, which is later *res* vested and transferred to the possession of the Alien Property Custodian, may recover, by suit under Section 9 (a) of the Act an "interest, right, or title", in the property.

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent statutory provisions and orders and regulations issued thereunder are set forth in the Appendix, *infra* (pp. 16-30).

STATEMENT

The facts are not in dispute. Petitioners (except the Sheriff) are New York security and commodities brokers known as Orvis Brothers & Co. In 1934 they opened a margin account in favor of Takenosuke Itoh, which was guaranteed by C. Itoh & Co., Ltd., later succeeded by Sanko Kabu-

siki Kaisya, ("Sanko"). All three were Japanese nationals (R. 34-36). This account was closed out in March, 1938, at which time the customer was indebted to Orvis in the amount of \$43,341.37. Before the outbreak of war this indebtedness had been reduced to approximately \$19,796.85 (R. 35-36). In June, 1943, Orvis commenced an action on the debt in the Supreme Court of New York, New York County, and on December 3, 1943, secured judgment for \$20,714.84 against Sanko (R. 36, 37). On June 28, 1943, Orvis had caused a warrant of attachment to be levied on a debt owing to Sanko by Anderson, Clayton & Co. (R. 36). Orvis and the Sheriff also commenced an action in aid of attachment against Anderson, Clayton & Co., and on October 28, 1946, secured a judgment of \$5,136.09 conditioned on plaintiff's securing a license under Executive Order No. 8389. Thereafter, a larger indebtedness from Anderson, Clayton & Co. to Sanko was discovered and on February 20, 1948, the judgment was amended *nunc pro tunc* to provide that Orvis should recover of Anderson, Clayton & Co. the sum of \$29,633.24 to be applied in satisfaction of the judgment against Sanko and fees, costs, and disbursements (R. 37-39).

At the time of the levy of attachment, the property of Sanko was blocked under Executive Order No. 8389, as amended. Petitioners did not apply for or obtain a license authorizing the attachment. Petitioners did apply, on or about November 20,

1946, for a license to permit Anderson, Clayton & Co. to pay the funds in its possession to the Sheriff, and this was denied on February 15, 1947 (R. 21, 37).

The funds in question were vested under the Trading with the Enemy Act as enemy-owned property by *res vesting* orders issued on June 27, 1947, and November 25, 1947, and the Alien Property Custodian secured possession of the funds (R. 37-38, 43-44). Before the vesting orders had been issued, however, petitioners filed a notice of claim with the Custodian. This was treated by the Custodian as another application for a retroactive license and such a license was denied. (R. 24.)

In 1949 the Claims Branch of the Office of Alien Property moved to dismiss petitioners' notice of claim insofar as it was a claim for the return of a property interest in the vested property. To this extent the claim was dismissed by the Hearing Examiner and his action upheld by the Director of the Office of Alien Property. (R. 24-25.) To the extent that the claim seeks payment of a debt under Section 34 of the Act, it is still pending.

Prior to this dismissal, *pro tanto*, of petitioners' administrative claim, petitioners brought this action on April 28, 1949 (see R. 11), under Section 9 (a) of the Trading with the Enemy Act, seeking a decree declaring that they have a lien on the vested property superior to the

rights of the defendant, that the defendant holds the property subject to their lien, and that the orders *res* vesting the property in question were valid and effective only to the extent of any surplus that might remain after the property had been first applied to the satisfaction of petitioners' claim, and requiring defendant to ~~pay~~ to the Sheriff such part of \$29,633.24 as is necessary to satisfy plaintiffs' judgment, with interest and costs (R. 27).

Respondent moved for judgment on the pleadings and petitioners cross-moved for summary judgment (R. 31, 32). The District Court denied respondent's motion and granted petitioner's motion on the authority of *Zittman v. McGrath*, 341 U. S. 466 (R. 66).

The Court of Appeals reversed (R. 80) holding that the defendant was entitled to hold the vested assets for administration under Section 34 of the Act and that petitioners had no "interest, right or title" in the property which they could recover from the defendant in a suit under Section 9 (a) (R. 76-79).

ARGUMENT

This case presents the question, which this Court left open in the two cases of *Zittman v. McGrath*, 341 U. S. 446, and 341 U. S. 471, whether a creditor of an enemy debtor whose property has been *res* vested pursuant to the Trading with the Enemy Act, is entitled to any lien or other right of priority by reason of an

unlicensed attachment, obtained after the effective date of the freezing order. Here the Custodian, "exercising the paramount power^{us} of the United States" *res* vested the debtor's property and thereby "[took] over the entire fund for administration under the Act" (341 U. S. at 464). He thus followed the same procedure as in the second *Zittman* case, in which this Court expressly reserved "for decision in the proceedings prescribed by statute" "all questions as to the petitioners' claims, judgments, or priorities" (341 U. S. at 474).

The present petitioners, by suit under Section 9 (a) of the Act, seek to recover interests founded upon unlicensed attachments as property interests to which they are entitled absolutely, without regard to, and in advance of any disposition of claims of other creditors under Section 34 of the Act. We believe the court below rightly denied such relief. In the first place, this Court in the second *Zittman* case indicated that the appropriate remedy for an unlicensed attachment creditor was Section 34 of the Act, a remedy which petitioners did not here invoke. In the second place, if these petitioners are entitled to proceed under Section 9, the court below correctly held that their unlicensed attachments gave them no such interest as could be recovered under that section. Finally, we point out that the question here presented may no longer be of such importance as to require review by this Court.

1. In the second *Zittman* case, 341 U. S. 471, this Court indicated that the section of the Act under which the unlicensed attaching creditor should assert his rights was Section 34. The Court said (341 U. S. at 473-474):

While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of such foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States,"² it is not a confiscation measure but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts.³ If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia.⁴ The transfer of possession of these funds does not purpose to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration.

In view of these facts, we decide, and decide only, that the Custodian has power to possess himself of these funds and to ad-

² Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, § 5 (b) (1), 55 Stat. 839.

³ § 34 (a), 60 Stat. 925.

⁴ *Id.* § 34 (e), (f).

minister them. To hold otherwise would be incompatible with the federal program. The consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment, are not ripe for determination. They may never come into controversy. All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by statute.

2. Assuming, however, that petitioners may appropriately assert their claim to priority by suit under Section 9 (a), we believe that the court below correctly held that they do not have a lien or a right to priority good as against the United States, however valid it might be against their private debtor.

The same statute under which the funds in question were vested also authorized their "freezing". Executive Order No. 8389, effective as to Japan on June 14, 1941, 6 F. R. 3715, prohibited, *inter alia*:

E. All *transfers*, withdrawals, or exportations of, or *dealings in*, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. [Italics added.]

Under this order, the Treasury Department issued on April 21, 1942, prior to the attachments in this case, General Ruling 12 (7 F. R. 2991), which declared that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void, and defined "transfer" to include the issuance or levy of any attachment. Paragraph 4 of the General Ruling added that no attachment could confer a greater interest in property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license," although it would be valid *for the parties* for the purpose of determining the rights or liabilities litigated.

Thus the freezing regulations unequivocally prohibited the creation, by unlicensed attachment, of any interest which would be valid *as against the government*.¹ By those regulations the United States, acting in time of emergency leading to war, sought to maintain assets subject to them in *status quo* until the national policy with respect

¹ This Court's decision in the first *Zittman* case is not to the contrary. This Court regarded the Custodian in that case as asking a declaration that as between private parties the attachments were invalid. 341 U. S. at 463-464. And it expressly reserved for later decision "all federal questions as to recognition by the Custodian of the state law lien, or priority of payment" in the event the Custodian should *res vest* the accounts. 341 U. S. at 464.

In this very context of enemy property this Court said in cases arising under the Confiscation Act of 1862, that trans:

thereto should ultimately be determined by the Congress and the Executive.

The freezing controls were regarded by Congress "as a system which can prevent transactions in foreign property prejudicial to the best interests of the United States." H. Rep. 1507, 77th Cong., 1st sess., p. 3. As such they were intended not merely to prevent the enemy from obtaining any benefit from the frozen assets, but also "to preserve the property * * * for the benefit of Americans who may have claims" (Senator Barkley, 86 Cong. Rec. 5006 (1940)). As this Court stated in *Propper v. Clark*, 337 U. S. 472, 484:

The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected.

fers *pendente bello* of enemy property were subject to be set aside or disregarded when the United States decided to exercise its sovereign power of seizure. Accordingly it read "null and void" in that Act as meaning void against the United States, though the transfers might be good as between the parties, *Corbett v. Nutt*, 10 Wall. 464, 478; *Conrad v. Waples*, 96 U. S. 279, 287. The same has been said under the Trading with the Enemy Act, *Schrijver v. Sutherland*, 19 F. 2d 688 (C. A. D. C.).

The Treasury Department, which was charged with the primary responsibility for administering the Order, understood that a purpose of the Order was to hold the funds "as is" for subsequent disposition and so advised Congress. Mr. Luxford, Assistant General Counsel for Foreign Funds Control, testified in 1944: "We are holding the assets until this Government might decide as to what it wants to do with them; the Government is the one to make the decision as to what the funds will be used for. And if the Government decides it wants to use the funds for reparations or to pay American creditors the funds will be available". Hearings, Subcommittee No. 1 of House Committee on the Judiciary, 78th Cong., 2d Sess., on H. R. 4840, June 9, 13, 14 and 15, 1944, pp. 98-99. See also the statement of the aims of the "freezing" program set out in *Zittman v. McGrath*, 341 U. S. 446, 453-454. In fact the policy of the United States with respect to the disposition of enemy property and American creditors' claims thereto was not determined until some years after our entry into the war. In 1946 Section 34 was added to the Act. That section provided for the equitable and ratable distribution of vested property among creditors. Thereafter in the War Claims Act of 1948 (62 Stat. 1240) Congress provided that vested German and Japanese property should not be returned to its former owners (Section 12)

and that the proceeds of such property remaining after administration under the Trading With the Enemy Act should be covered into a War Claims Fund (Section 12, 13 (a)) to be used to provide compensation to American victims of Axis aggression (Sections 4-8).

To permit the acquisition by unlicensed attachments of indefeasible rights in enemy property would *pro tanto* impair its subsequent availability for disposition in accordance with the Act. If an unlicensed attachment, whether or not it is classed as a "transfer" within the Executive Order, is held to give the attaching creditors as "interest, right or title" assertible under Section 9 (a), then that creditor has the power to hold up the administration of the fund and to prevent payment to all other creditors whether entitled to priority or not, until his suit under Section 9 (a) has been finally decided.

In adopting Section 34, Congress recognized that under Section 9 (a) as it then existed "the rule of 'first come, first served' will apply, resulting in a race of diligence among creditors, exhaustion of many properties without an opportunity to make equitable distribution (many of the properties being insolvent), and interference with the authority, conferred by the First War Powers Act, 1941, to use the property in the interest of the United States". H. Rep. No. 2398, 79th Cong., 2d sess., pp. 9-10; S. Rep. No. 1839,

79th Cong., 2d sess., p. 3.² Section 34 was designed to prevent such a race of diligence. *Ibid.*

Notwithstanding the facts that Congress and the Executive sought by freezing to immobilize the property pending later determination as to its ultimate disposition, and that Congress thereafter determined that enemy property should be applied among creditors, not on a first-come, first-served basis, but equitably, petitioners here contend that by unlicensed attachments they acquired a right to payment of their creditors' claims in full without regard to the claims of other creditors. They found that claim, not on some security interest given them by the enemy debtor at the time the debt was created, but solely on their own diligence in pursuing, after the effective date of the freezing order, the remedies available in New York to a general creditor. We believe the court below was entirely correct in holding that to permit recognition of such an interest in a suit under Section 9 (a) would defeat the purposes of the federal freezing and vesting programs.³

² See *United States v. Securities Corporation General*, 4 F. 2d 619, 622 (C. A. D. C.) affirmed *sub nom. White v. Mechanics Securities Corp.*, 269 U. S. 283.

³ In decisions prior to the *Zittman* cases, the district courts uniformly held that a claimant whose "interest" depended upon an unlicensed transfer might not recover under Section 9 (a). *Heyden Chemical Corp. v. Clark*, 85 F. Supp. 949 (S. D. N. Y.); *Blank v. Clark*, 79 F. Supp. 373 (E. D. Pa.); *Okiyama v. Clark*, 71 F. Supp. 319 (D. Hawaii).

3. For the foregoing reasons we believe that the result reached by the court below is correct. There is no conflict with ^{any} decision of this or any other court. The holding in the instant case affects only unlicensed attachment creditors of enemies whose property has been or may be vested. While the records of the Office of Alien Property (Annual Report, June 30, 1950, p. 67) show that approximately 60,000 claims against vested property seeking payment of some \$750,000,000 have been filed, a search of the records discloses only 13 claims involved \$328,500 filed by persons claiming an unlicensed attachment lien. Filing of such a claim is a condition precedent to the beginning of a suit under Section 9 (a). Of these 13 claims only the instant case and one other are involved in pending litigation. Over \$200,000 of the total claims involved are accounted for by this case and the claims in the *Zittman* cases. All of the attachments involved were obtained in New York, and all the litigation now pending is pending within the Second Circuit. Accordingly, this Court may feel that the issue is not now of sufficient importance and general application to call for the issuance of the writ.

CONCLUSION

The issue of law presented is not in conflict with the decisions of this Court and does not call for resolution by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General,

ROWLAND F. KIRKS,
Assistant Attorney General,

JAMES D. HILL,

GEORGE B. SEARLS,

WESTLEY W. SILVIAN,

*Attorneys,
Department of Justice.*

DECEMBER 1952.

APPENDIX

1. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. I, *et seq*:

* * * * *

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839] * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 9. (a) [as amended by the Act of March 4, 1923, 42 Stat. 1511] That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and

containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 34. (a) [as added by the Act of August 8, 1946, 60 Stat. 925] Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of

June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I; Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims

in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit of proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses

of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian.

The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the

Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed \$600; (2)

claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this

Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emer-

gency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

* * * * *

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing

shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order; or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

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4. Assets of and claims against Sanko Kabu-siki Kaisya (formerly C. Itoh & Co., Ltd.) received by and filed with the Office of Alien Property:

- a. Assets (Account No. 39-21639)—\$36,236.02.
 b. Claims—\$192,371.38 identified by the following Notice of Claim numbers:

1307—\$528.25 claimed by James E. Fox & Co. as reimbursement for payment of custom duties.

2022—\$20,714.84 claimed by Orvis Bros. for margins in connection with cotton futures.

4044—\$6,717.22 claimed by Jenks Gwynne & Co. for margins in connection with cotton futures.

8723—\$26,499.01 claimed by Bond, McEnany & Co. as liability on loan account covering cotton transactions.

18940—\$136,546.96 and Yen 100,056.11 claimed by Yokohama Specie Bank for liabilities on bills of exchange.

33489—\$415.51 claimed by Hunt, Hill & Betts for fees for legal services.

33853—\$174.37 claimed by John J. McCloskey for poundage fee.

34646—\$648.95 claimed by National City Bank for liabilities for bills of exchange.

39371—\$126.27 claimed by Attorney General for collection expenses.